Malayan Banking Bhd v Salem High Country Holidays Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D-22–1232 OF 1993
AMELIA TEE ABDULLAH JC
30 OCTOBER 2009

Banking — Security for advances — Guarantee — Whether freezing of first defendant's account amounted to material variation of terms of agreement between parties — Whether plaintiff proven its claim — Whether plaintiff's claim against guarantors premature — Whether guarantees void for want of consideration

The plaintiff bank granted the first defendant a term loan and an overdraft amounting to RM440,000 ('loan A') and later an additional overdraft of RM80,000 ('loan B'). As security for loan A the first defendant created a first and second legal charge over a five storey shop lot in Kuala Lumpur ('the property') and the second and third defendants executed two guarantees. As security for loan B a third legal charge was created over the property and the second and third defendants also executed another guarantee. Some time around 8 February 1991 when the first defendant failed to conduct its account in a satisfactory manner the plaintiff issued notices to the first defendant whereby it required the latter to comply with the terms of its term loan and overdraft facility. Thereafter the first defendant's account was frozen. However, the plaintiff reminded the first defendant by way of its letter dated 24 September 1992 that even though its account was frozen, the latter was still required to service the interest and maintain the account within the authorised limit, failing which the plaintiff would recall the entire facility. When the first defendant failed to take appropriate steps to regularise the account, the plaintiff recalled both the term loan as well as the overdraft facilities. The plaintiff then issued letters of demand to all the defendants to demand for the outstanding amounts of RM519,146.97 as at 31 July 1993 together with interest in respect of the overdraft facility and a sum of RM133,759.11 together with interest in respect of the term loan facility. In the meantime, proceedings were taken by the registered owner of the property to challenge the validity of the three legal charges over the property and these charges were found to be valid. The plaintiff instituted the present action against the defendants. However, the first defendant had been wound up and the plaintiff only had recourse against the second and third defendants as guarantors to the banking facilities. In their defence the second and third

A defendants contended that the plaintiff's freezing of the account amounted to a material variation of the terms of loans A and B and that therefore the defendants were discharged as guarantors; that the plaintiff had failed to show how it arrived at the sums of RM519,146.97 and RM133,759.11 together with capitalised interest and costs and therefore it had failed to prove its claim B for the said amounts; that the plaintiff's claim against them was premature because it ought to have foreclosed on the property first and could only claim against the second and third defendants if there was a shortfall in the proceeds of sale of the property; that the three guarantees were void for want of consideration since the consideration provided was past consideration. These C were the issues that were before the court in this case.

Held, allowing the plaintiff's claim against the second and third defendants with costs: D

(1) Although there was no specific provision in the letters of offer from the plaintiff that it could freeze the first defendant's account there was clear provision which allowed the plaintiff to recall or cancel the facilities at any time that it deemed fit. In the present case the plaintiff did fulfill E the terms of the agreement when it provided the first defendant with the term loan facility and the overdraft facility and the guarantee provided by the second and third defendants was for the provision of these banking facilities. Thereafter, the question of whether the first defendant or any other customer of the plaintiff would continue to F operate its account with the plaintiff would depend on whether it operated its account satisfactorily. In the circumstances the freezing of the first defendant's account as a result of the manner of the operation of the account and a combination of factors was the decision of a banker guided at all times by prudence and did not amount to a G variation of the principle agreement. As such, the freezing of the account did not constitute a material variation or even a variation of the agreement between the parties (see paras 15, 17, 19, 20 & 21).

(2) A perusal of the letters of guarantee and in particular cl 11 thereof showed that the plaintiff had proven its claim for the RM519,146.97 H and RM133,759.11 as at 31 December 1993. Further, the absence of the second and third defendants at the hearing meant that there was no real or meaningful challenge or dispute as to the accounts (see paras 26, 28–29).

I (3) The letters of guarantee did not impose on the plaintiff a pre-condition that it had to foreclose the property first before commencing any action against the guarantors for any amounts owed by the first defendant. On the contrary, cl 7 of the letter of guarantee entitled the plaintiff to enforce the guarantee notwithstanding that other means of payment

had not been resorted to. In any event in the light of the proceedings taken by the registered proprietor of the charged property the plaintiff was entitled to proceed against the guarantors without first foreclosing on the principal security (see paras 36 & 37).

(4) The preamble to the letters of guarantee in the instant case showed that the guarantees in this case were a continuing guarantee and as such the argument that the guarantees were void for past consideration was without merit (see paras 40 & 41).

[Bahasa Malaysia summary

Plaintif memberikan pinjaman bersyarat dan overdraf kepada defendan pertama berjumlah RM440,000 ('pinjaman A') dan kemudiannya overdraf tambahan RM80,000 ('pinjaman B'). Sebagai cagaran untuk pinjaman A, defendan pertama membuat gadaian pertama dan kedua terhadap lot kedai lima tingkat di Kuala Lumpur ('hartanah') dan defendan kedua dan ketiga telah membuat dua jaminan. Sebagai cagaran untuk pinjaman B, gadaian ketiga dibuat ke atas hartanah tersebut dan defendan kedua dan ketiga juga membuat satu lagi jaminan. Sekitar 8 Februari 1991 apabila defendan pertama gagal untuk mematuhi terma-terma pinjaman dan overdrafnya dengan memuaskan, plaintif mengeluarkan notis-notis kepada defendan pertama di mana ia meminta defendan pertama mematuhi terma-terma pinjaman bertempoh dan kemudahan overdrafnya. Kemudiannya akaun defendan pertama dibekukan. Walau bagaimanapun, plaintif mengingatkan defendan pertama melalui suratnya yang bertarikh 24 September 1992 bahawa meskipun akaunnya dibekukan, defendan pertama masih perlu membayar faedah dan mengekalkan akaunnya dalam had yang dibenarkan, kegagalan berbuat demikian akan membuatkan plaintif menarik balik keseluruhan kemudahan. Apabila defendan pertama gagal mengambil langkah-langkah wajar untuk meregulasikan akaun, plaintif menarik balik pinjaman bertempoh tersebut dan begitu juga dengan kemudahan-kemudahan overdraf. Plaintif kemudiannya mengeluarkan surat-surat tuntutan kepada kesemua defendan untuk jumlah belum jelas RM519,146.97 pada 31 Julai 1993 bersama dengan faedah atas kemudahan overdraf dan sejumlah RM133,759.11 bersama dengan faedah atas kemudahan pinjaman bertempoh tersebut. Sementara itu, tindakan yang diambil oleh pemilik berdaftar hartanah untuk mencabar kesahan ketiga-tiga gadaian terhadap hartanah tersebut dan gadaian-gadaian tersebut didapati sah. Plaintif memulakan tindakan ini terhadap defendan-defendan. Walau bagaimanapun, defendan pertama telah digulungkan dan plaintif hanya boleh bertindak terhadap defendan kedua dan ketiga sebagai penjamin-penjamin kemudahan-kemudahan perbankan tersebut. Dalam pembelaannya, defendan kedua dan ketiga menghujah bahawa pembekuan akaun oleh plaintif merupakan ubahan material terma-terma pinjaman A dan

B dan oleh itu defendan-defendan dilepaskan sebagai penjamin-penjamin; bahawa plaintif gagal menunjukkan bagaimana ia mencapai jumlah RM519,146.97 dan RM133,759.11 bersama dengan faedah dipermodalkan dan kos dan oleh itu ia gagal membuktikan tuntutannya terhadap jumlah-jumlah tersebut; bahawa tuntutan plaintif terhadap mereka adalah pramatang kerana ia perlu menghalangtebus hartanah tersebut terlebih dahulu dan hanya boleh menuntut terhadap defendan kedua dan ketiga sekiranya terdapat kekurangan dalam hasil jualan hartanah tersebut; bahawa ketiga-tiga jaminan adalah tidak sah kerana tanpa balasan memandangkan balasan yang diberikan merupakan balasan lampau. Ini merupakan isu-isu yang dihadapkan ke mahkamah dalam kes ini.

Diputuskan, membenarkan tuntutan plaintif terhadap defendan kedua dan ketiga dengan kos:

(1) Walaupun tidak terdapat peruntukan khas dalam surat tawaran daripada plaintif bahawa ia boleh membekukan akaun defendan pertama, terdapat peruntukan jelas yang membenarkan plaintif untuk menarik balik atau membatalkan kemudahan-kemudahan pada bila-bila masa yang dirasakan sesuai. Dalam kes ini plaintif telah memenuhi terma-terma perjanjian apabila ia memberikan kemudahan terma pinjaman dan kemudahan overdraf kepada defendan pertama dan jaminan yang diberikan oleh defendan kedua dan ketiga adalah untuk peruntukan kemudahan-kemudahan perbankan tersebut. Kemudiannya, persoalan sama ada defendan pertama atau pelanggan plaintif yang lain akan meneruskan operasi akaunnya dengan plaintif bergantung sama ada operasi akaunnya adalah memuaskan. Dalam keadaan ini pembekuan akaun defendan pertama sebagai hasil perlaksanaan operasi akaun dan gabungan faktor-faktor merupakan keputusan pemilik bank secara terperinci dan bukan merupakan ubahan perjanjian dasar. Oleh itu, pembekuan akaun bukan merupakan ubahan material atau ubahan di antara pihak-pihak (lihat perenggan 15, 17, 19, 20 & 21).

(2) Penelitian surat-surat jaminan dan khususnya klausa 11 menunjukkan bahawa plaintif telah membuktikan tuntutannya untuk RM519,146.97 dan RM133,759.11 setakat 31 Disember 1993. Selanjutnya, ketidakhadiran defendan kedua dan ketiga pada perbicaraan bermaksud tidak terdapat cabaran sebenar atau bermakna atau pertikaian mengenai akaun-akaun tersebut (lihat perenggan 26, 28–29).

(3) Surat-surat jaminan tersebut tidak mengenakan pra-syarat bahawa ia perlu menghalangtebus hartanah terlebih dahulu sebelum memulakan apa-apa tindakan terhadap penjamin-penjamin untuk mana-mana jumlah yang dihutang oleh defendan pertama ke atas plaintif.

Sebaliknya, klausa 7 surat jaminan memberi hak kepada plaintif untuk menguatkuasakan jaminan walaupun cara membuat pembayaran yang lain tidak digunakan. Dalam apa-apa keadaan berkenaan prosiding-prosiding yang digunakan oleh tuan punya berdaftar hartanah yang dicagarkan, plaintif berhak untuk meneruskan prosiding terhadap penjamin-penjamin tanpa menghalangtebus jaminan utama (lihat perenggan 36 & 37).

(4) Mukadimah kepada surat-surat jaminan dalam kes ini menunjukkan bahawa jaminan-jaminan tersebut merupakan jaminan yang berterusan dan oleh itu pertikaian mengenai jaminan tersebut tidak sah kerana balasan lampau adalah tanpa merit (lihat perenggan 40 & 41).]

Notes

For cases on guarantee, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2139–2184.

Cases referred to

Citibank NA v Ooi Boon Leong [1981] 1 MLJ 282, FC (refd)

Heng Chung Swee v Bangkok Bank Ltd [1978] 1 MLJ 149, FC (refd)

Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Ors [1990] 1 MLJ 485; [1990] 1 CLJ (Rep) 141, SC (refd)

Kwong Yik Finance Bhd v Mutual Endeavour Sdn Bhd & Ors [1989] 1 MLJ 135, HC (refd)

Malayan Banking Bhd v Edaran Pit Stop Sdn Bhd & Ors [2000] 5 MLJ 325; [2000] 1 CLJ 234, HC (refd)

National Bank of Nigeria Limited v Awolesi [1964] 1 WLR 1311, PC (refd)

Perwira Habib Bank (M) Bhd v Saiyo Sdn Bhd & Ors [1991] 3 CLJ (Rep) 451, HC (refd)

United Malayan Banking Corp Bhd v Chen Yin Khee & Ors [2005] 2 MLJ 118; [2004] 4 CLJ 385, CA (distd)

Legislation referred to

Contracts Act 1950 s 86

Izleen bt Ismail (Azura bt Adnan with her) (Syed Alwi & Co) for the plaintiff. Thilagavathy (Philip Choong & Co) for the defendants.

Amelia Tee Abdullah JC:

[1] It is an agreed fact that the first defendant, Salem High Country Holidays Sdn Bhd, was given banking facilities by the plaintiff, Malayan Banking Bhd. Vide a letter of offer dated 27 November 1990, the first defendant was offered a term loan of RM140,000 and an overdraft of

RM400,000 ('loan A'). Vide a second letter of offer dated 9 October 1991, the first defendant was approved an additional overdraft facility of RM80,000 ('loan B').

[2] As security for loan A:

(a) the first and second legal charges were created over a five storey shop lot with a postal address at No 89, 89A, 89B, 89C and 89D, Medan Bunus, Kuala Lumpur held under title deed HS (D) 23787, PT No 220, Section 40, District of Kuala Lumpur ('the said property'); and

(b) the second and third defendants executed two guarantees dated 2 January 1991.

[3] As further security for loan B:

(a) a third legal charge was created over the said property; and

(b) the second and third defendants executed a guarantee dated 2 December 1991.

[4] The plaintiff called a witness, Encik Zool Amali bin Mohamed, an executive of the plaintiff, in support of its case. The court was informed by learned counsel for the second and third defendants that the defendan's were calling no witnesses. It was noted that they were also physically not present during the hearing.

[5] It is the plaintiff's case that the first defendant had failed to comply with the terms and conditions of the banking facilities. Encik Zool Amali bin Mohamed (PW1) had testified that the first defendant had initially complied with the terms of his overdraft and term loan facility until 8 February 1991 when he had exceeded his overdraft limit. Upon the first defendant's failure to conduct its account in a satisfactory manner, the plaintiff had issued it with various notices dated 8 February 1991, 10 May 1991, 18 June 1991 and 12 July 1991.

[6] Reference was made to letters issued by the plaintiff to the first defendant as exhibited in Part II of the agreed bundle. Vide a letter dated 24 September 1992 (p 32), the first defendant was reminded that even though its account was frozen, it was still required 'to service the interest and maintain the account within the authorised limit, failing which you have triggered off an event of default and have entitled the bank to recall the entire loan facility'. In that same letter, the first defendant was advised to co-operate and to settle the excess of RM21,711.25 upon receipt of the letter. Vide another letter dated 1 April 1993, the first defendant was required to settle

the amount of RM40,950.87, being the excess over the authorised overdraft limit, within 14 days from the date of the letter.

[7] When the first defendant failed to take appropriate steps to regularise the account, the plaintiff recalled both the term loans as well as the overdraft facilities.

[8] It is an agreed fact that the plaintiff had issued letters of demand to all the defendants to demand for the outstanding sum and interest. Vide letters dated 10 August 1993, the plaintiff's solicitors wrote to the defendants to demand a sum of RM519,146.97 as at 31 July 1993 together with interest at the rate of 2% above the base lending rate for the overdraft and a sum of RM133,759.11 together with interest also at the rate of 2% above the base lending rate in respect of the term loan as well as penalty interest above the whole amount outstanding.

[9] It is an agreed fact that proceedings were taken by Teh Cheng Choo, the registered owner of the said property to challenge the validity of the first, second and third legal charges over the said property and that the Federal Court had on 18 May 2009 held that the said charges were valid.

[10] It is an undisputed fact that the first defendant has been wound up vide Case No MT3–28–152 of 1998 in the Shah Alam High Court.

[11] The second and third defendants have denied the plaintiff's claim citing the following grounds:

(a) that the second and third defendants are discharged as guarantors by reason of the plaintiff's act in freezing the first defendant's bank account;

(b) that the plaintiff had failed to prove its claim for RM519,146.97 and RM133,759.11 together with capitalised interest and costs;

(c) that the plaintiff's claim against the second and third defendants is premature as it had failed to foreclose the principal security of loans A and B; and

(d) the three guarantees signed by the second and third defendants are void for want of consideration.

[12] I will now consider each of the issues raised in turn.

Whether the second and third defendants are discharged as guarantors by reason of the plaintiff's act in freezing the first defendant's bank account

[13] The various contentions of the second and third defendants on which

A they base their argument that they are discharged as guarantors can be summarised as follows:

(a) There were no provisions in the letters of offer for both loans A and B to allow the plaintiff to freeze the first defendant's account pending the determination of the dispute. Furthermore, the plaintiff had always taken the stand that the first, second and third legal charges were valid;

B

(b) The purpose of loans A and B was to provide working capital for the first defendant. The plaintiff had knowledge that the first defendant's business was a travel agency which deals with airline ticketing, inbound and outbound tours and hotel and group bookings. Encik Zool Amali had agreed that if the first defendant's account was frozen, it would have problems in carrying out its business. The effect of the freezing of the account was that the first defendant would not be able to operate its account and neither could it issue or receive cheques. It was thus unable to carry out its business and service its payments for loans A and B; and

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(c) The plaintiff's witness had agreed that the freezing of the first defendant's account amounted to a material variation of the letters of offer for loans A and B. The plaintiff also did not obtain the consent of the second and third defendants before freezing the account.

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[14] The issue that arises here is whether the freezing of the bank account of the first defendant amounted to a material variation of the letter of offer for loans A and B. Learned counsel for the second and third defendants had referred the court to s 86 of the Contracts Act 1950 which reads as follows:

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> 86 Discharge of surety by variance in terms of contract
>
> Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

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[15] I have carefully perused the contents of the letters of offer for loans A and B as well as the letters of guarantee. It is clear that the agreement between the plaintiff and the first defendant was for the furnishing of banking facilities (a term loan and an overdraft) amounting to RM440,000 in respect of loan A and for an additional overdraft of RM80,000 in respect of loan B. Whilst it is true that there is no specific provision in the letters of offer which states that the plaintiff can freeze the account of the first defendant, however, there is clear provision which allows the plaintiff to recall or cancel the facilities at any time that it deems fit.

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[16] I have perused the authorities and illustrations cited by learned counsel for the second and third defendant's in support of her argument. The Supreme Court, in the case of *Kidurong Land Sdn Bhd & Anor v Lim Gaik*

Hua & Ors [1990] 1 MLJ 485; [1990] 1 CLJ (Rep) 141 when considering the variations to the joint-venture agreement and s 86 of the Contracts Act 1950, had referred to various cases including the case of *Citibank NA v Ooi Boon Leong* [1981] 1 MLJ 282 at p 283 which followed the Privy Council decision in *National Bank of Nigeria Limited v Awolesi* [1964] 1 WLR 1311. The law is clear that if there is any agreement to vary the terms of a contract between the principals, the sureties must be consulted. This is so unless the variation is unsubstantial or else not prejudicial to the sureties. The sureties should consent to any variation and if they have not so consented, they must be discharged.

[17] Whilst accepting the above to be the correct statement of the law, I would now move to consider whether the act of the plaintiff in freezing the first defendant's account amounted to a variation of the agreement between them. The agreement between the principals was for the provision of banking facilities, to be more precise, a term loan and an overdraft facility. As far as the term loan is concerned, the position is clear. The loan was given, the amount of the loan duly disbursed. The overdraft facility was also given, and at times the amount utilised was even in excess of the overdraft facility. I thus find that the plaintiff had honored the terms of the agreement between the parties in providing the term loan as well as the overdraft facility.

[18] The question that arises is this: where an account is not conducted in a satisfactory manner, can the plaintiff terminate the banking facilities and/or freeze the first defendant's account? Where a dispute arises over the said property charged to the plaintiff as security for the banking facilities, can the plaintiff terminate the said facilities and freeze the first defendant's account? Was the plaintiff obliged to continue to provide banking facilities notwithstanding that the account was unsatisfactorily conducted and the security for the said facilities was being disputed? Would the termination of the banking facilities and/or the freezing of the first defendant's account amount to a material variation of the contract or agreement between the parties that would entitle the second and third defendants to be discharged as guarantors for loans A and B?

[19] In deciding this question, I have considered the fact that the consideration for the second and third defendants standing as guarantors was the plaintiff's:

> opening or continuing an account with and making or continuing to make advances loans or otherwise giving credit or accommodation or granting time to ...

the first defendant. The fact remains that the plaintiff did fulfill the terms of the agreement and did provide the first defendant with the facility. The term loan was given. So too was the overdraft. I find that it is *not* a condition of

A the contract or agreement between the plaintiff and the first defendant nor a term of the letters of guarantee signed by the second and third defendants that the plaintiff must *at all times* maintain or allow the account of the first defendant to remain open.

B **[20]** The plaintiff is a financial institution and a custodian of public funds. The provision of financial services is its business. In carrying out its business, the plaintiff is required to conduct its business with prudence and care. I find that in this case the plaintiff had complied with the terms of its agreement when it furnished banking facilities to the first defendant. The question of C whether the first defendant or any other customer of the plaintiff will continue to operate an account with the plaintiff would depend on whether it operates its account satisfactorily or otherwise.

D **[21]** I have considered carefully the submissions of learned counsel for the second and third defendants and the wealth of authorities submitted which has rendered the court considerable assistance. However, I regret that I am not convinced that the freezing of the first defendant's account by the plaintiff constituted a material variation or even a variation of the agreement between the parties. I find that the agreement or contract between the parties was the E provision of banking facilities and that this was fulfilled by the plaintiff. I find that the guarantee provided by the second and third defendants was for the provision of these banking facilities. The freezing of the first defendant's account as a result of a combination of factors, not the least being the conduct of the account, was the decision of a banker and guided at all times F by prudence and did not amount to a variation of the principle agreement.

Whether the plaintiff had failed to prove its claim for RM519,146.97 and RM133,759.11 together with capitalised interest and costs

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[22] The second and third defendants have submitted that the plaintiff has failed to show the court how it arrived at the sums of RM519,146.97 and RM133,759.11 as at the date of filing the statement of claim. They further complained that there was no breakdown of the interest claimed as well as the H applicable interest rates.

[23] Learned counsel for the second and third defendants had submitted that the plaintiff was only relying on the two statements of accounts, P2 and P3, in support of its claim for the overdraft facility and term loan accordingly I but that these statements of accounts were incomplete. In her submissions, she questions the accuracy of the accounts and points specifically to a sum of RM50,000 withdrawn at a time when the account was frozen. The court notes that this question was never put to the plaintiff's witness when he was on the stand.

[24] Counsel referred the court to the case of *United Malayan Banking Corp Bhd v Chen Yin Khee & Ors* [2005] 2 MLJ 118; [2004] 4 CLJ 385 where the Court of Appeal had occasion to decide on the issue of whether the sum claimed by the plaintiff was proved, taking into account both the oral as well as documentary evidence. I have perused the above decision and find that the facts of that case can be distinguished from the facts of the instant case. In *Chen Yin Khee*'s case, the bank officer called by the plaintiff testified that she had knowledge of the loan involved, that both the borrower company as well as the respondent guarantors made no payment towards the additional loan. She produced the guarantee and indemnity and the two notices of demand. She concluded by stating the amount due as at the date of her testimony.

[25] It is noted that in *Chen Yin Khee*'s case, the Court of Appeal had found that the particulars of the account 'were strenuously disputed by the defendants'. As stated by Her Ladyship Siti Norma Yaakob JCA at p 121 (MLJ); p 387 (CLJ):

> As this is a money claim based on accounts kept by the appellant, particulars of which are strenuously disputed by the respondents it is of utmost importance that the appellant produce all the accounts to establish the respondent's liabilities. This is more so when the amount claimed in the statement of claim is for RM248,377.65 as at 13 August 1987, but at the date of trial, the amount had risen to RM804,255.82 and SPI had not explained how the initial claim had accumulated to more than sevenfold.

[26] In our present case, both the second and third defendants chose to be absent from the hearing and thus no evidence was adduced on their behalf in support of their case. They were only relying on the cross-examination of the plaintiff's witness and their submissions. I have carefully scrutinised the questions posed by learned counsel for the second and third defendants to the plaintiff's witness and I find that the three questions posed during cross-examination on this point to hardly amount to strenuous dispute.

[27] The court notes that in the statement of claim filed on 4 November 1993, the plaintiff was claiming a sum of RM519,146.97 as at 31 July 1993 (in respect of the overdraft) and a sum of RM133,759.11 as at 31 July 1993 (in respect of the term loan). Although the statements of account for the overdraft (P2 A–L) covered a period from 31 December 1992 to 31 December 1993, it is pertinent to note that P2 H for the month of July 1993 would show that the amount outstanding on the overdraft as at 31 July 1993 was in fact RM519,146.97, the amount of the claim. Similarly, P3 B of the so-called term loan account (P3 A–F) would show the amount outstanding on the term loan as at 31 July 1993 to be RM133,759.11.

[28] From my perusal of the letters of guarantee, my attention was drawn to cl 11 which states, inter alia, that:

> A statement signed by your manager, sub-manager, secretary or any one of your officers as to the moneys and liabilities for the time being due or incurred to you from or by the Customer shall be final and conclusive evidence against me/us for all purposes including legal proceedings.

Such a statement can be found at p 37 of the agreed bundle where Mohd Jamal Nasir had signed as authorised signatory to certify the amounts outstanding both on the term loan as well as on the overdraft as at 31 July 1993.

[29] In light of the above, and in the absence of the second and third defendants at the hearing, from which there does not appear to be any real or meaningful challenge or dispute as to the accounts, I thus find that the plaintiff has proven its claim for the RM519,146.97 and RM133,759.11 as at 31 December 1993.

Whether the plaintiff's claim against the second and third defendants is premature as it had failed to foreclose the principle security of loans A and B

[30] The second and third defendants contend that the guarantees executed by them were merely secondary securities and that they should only be resorted to if the proceeds of the foreclosure proceedings over the said property were insufficient to settle loans A and B and the interest thereon. Reliance was placed on cl 37 of the first and third legal charges and cl 46 of the second legal charge which states, inter alia, that 'the said land shall be the principle security for the moneys due under this charge'.

[31] The argument advanced was that the plaintiff should foreclose on the said property first and that they could only claim against the second and third defendants if there was a shortfall in the proceeds of the sale of the said property. As such, their argument is that the plaintiff's action against them was premature and should therefore be dismissed.

[32] The plaintiff relies on cl 17 of the letters of guarantee in rebuttal of this argument. Clause 17 reads as follows:

> (1) As a separate and independent stipulation, I/we agree that any sum or sums of money which may not be recoverable from me/us on the footing of a guarantee whether by reason of any legal limitation disability or incapacity on or of the customer or by any other fact or circumstances and whether known to you or not shall nevertheless be

recoverable from me/us or each of us as sole or principal debtors and shall be paid by me/us on demand.

[33] The plaintiff argues that vide cl 17 above, the second and third defendants had bound themselves singularly or severally to pay on demand whatever sums outstanding as sole or principal debtors.

[34] Whether a party would indeed be bound and the extent to which it would be bound under a guarantee would depend on the facts of a specific case with reference to the guarantee document in question. See *Malayan Banking Bhd v Edaran Pit Stop Sdn Bhd & Ors* [2000] 5 MLJ 325; [2000] 1 CLJ 234.

[35] Reference was made by learned counsel for the plaintiff to the case of *Kwong Yik Finance Bhd v Mutual Endeavour Sdn Bhd & Ors* [1989] 1 MLJ 135 where the High Court had to decide on the issue of whether the plaintiff could proceed against the second and third defendants when the foreclosure proceedings were still pending and the sale was not yet finalised. In that case, Siti Norma Yaakob J (as Her Ladyship then was) held as follows:

> Just as the guarantors have no right to demand that the plaintiff creditor calls upon the first defendant, as the principal debtor, to settle the debt before asking them, the guarantors, to pay, they too have no right to insist that the plaintiff sell off the charged property first to offset the debt before suing them on the guarantee. The plaintiff has the option to exercise which of the two securities it wishes to enforce. It may even enforce both securities, as is done in this case, if it is found that one security is insufficient to settle the debt and it was to meet this eventuality that the plaintiff had in its wisdom insisted on two forms of security, the charge as well as the guarantee.

[36] In this case, I have carefully perused the letters of guarantee. I am unable to find any provision in these documents which imposes on the plaintiff a pre-condition that they must foreclose on the said property first before commencing any action against the guarantors for any amounts owing by the first defendant. On the contrary, cl 7 of the letters of guarantee clearly entitles the plaintiff to enforce the guarantee 'notwithstanding that other means of payment have not been resorted to ...'

[37] As such, on this issue, I find that the plaintiff's claim against the second and third defendants is not premature. I find that in light of the proceedings that were taken by Teh Cheng Choo, the registered owner of the said property, to challenge the validity of the charges, which dispute was only decided by the Federal Court on 18 May 2009 the plaintiff was entitled to proceed against the guarantors without first foreclosing on the principle

security.

Whether the three guarantees signed by the second and third defendants are void for want of consideration

[38] The second and third defendants contend that the three guarantees signed by them were void for want of consideration, or more specifically that the consideration was past consideration. The letter of offer for loan A was dated 27 November 1990 and accepted on 4 December 1990. The two letters of guarantees signed by the second and third defendants in respect of loan A were both dated 2 January 1991. As for loan B, the letter of offer was dated 9 October 1991 whilst the guarantees for loan B were dated 2 December 1991. It is true that Zool Amali bin Mohamed, the witness for the plaintiff, agreed during cross-examination that the guarantees came into existence after the letters of offer and 'selepas pengeluaran wang di bawah pinjaman/kemudahan'. The argument advanced for the court's consideration is that since loans A and B were released before the existence of the guarantees, the said guarantees were void for past consideration.

[39] In response to this argument, learned counsel for the plaintiff has referred the court to a wealth of authorities. In the case of *Perwira Habib Bank (M) Bhd v Saiyo Sdn Bhd & Ors* [1991] 3 CLJ (Rep) 451, the High Court held that even though the term loan was disbursed before the letter of guarantee was executed, there was nevertheless good consideration based on the terms of the letter of guarantee itself. The High Court noted that from the preamble of the letter of guarantee, it was clear that the second and third defendants had executed the guarantee in consideration of the plaintiff making or continuing advances or otherwise giving or continuing credit or banking facilities.

[40] The High Court in *Perwira Habib* also referred to and relied on the decision in the case of *Heng Chung Swee v Bangkok Bank Ltd* [1978] 1 MLJ 149 where the Federal Court held that the guarantee in that case was a continuing guarantee and that the defendant had signed the guarantee to guarantee the overdraft existing at that time and the overdraft to be made in the future.

[41] I have examined the preamble of the letters of guarantee in our instant case and find that the words:

> In consideration of your having opened, opening or continuing an account with and having made, making or continuing to make advances loans or otherwise having given, giving credit or accommodation or granting time to ...

are evident of it being a continuing guarantee. As such and in line with the

decision of the Federal Court in *Heng Cheng Swee*, I find that the argument that the guarantees were void for past consideration to be without merit.

[42] Based on the totality of the evidence adduced and supported by the documentary evidence tendered, I find that the plaintiff has succeeded in making out its case against the second and third defendants on a balance of probabilities. The plaintiff's claim against the second and third defendants is hereby allowed with costs.

Plaintiff's claim against the second and third defendants allowed with costs.

Reported by Kohila Nesan